IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

FAMILY COURT APPEAL NO.113 OF 2004

Sanjeev Murlidhar. Ambekar,
aged 44 years, Occ. Service,
Hindu, Indian Inhabitant,
residing at Flat No.12, Bldg. No.34,
North Wing, Pratik Nagar Co.op.
Housing Society, Yerwada,
Pune-411 006.
....Appellant.

Vs.

Vaishali Sanjeev Ambekar,
aged 36 years, Occ. Business,
Hindu, Indian Inhabitant,
residing at C/o. Murlidhar P. Nagalkar,
Flat No.204, Plot No.306,
Rukmini Co.op. Housing Society,
Sector-2, RDP 1, Charkop, Kandivali(W),
Mumbai- 400 067.
....Respondent.

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Mr. R.T. Lalwani for the Appellant.
Mr. Pramod J. Pawar for the Respondent.

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CORAM: S.B. MHASE &
R.S.MOHITE, JJ.

DATED: 27.10.2004.

ORAL JUDGMENT: (Per S.B. MHASE, J.)

1. This appeal is disposed of at the admission stage only with the consent of both sides counsel and on the basis of the irregularities pointed out by both sides and on the basis of concession given by them.

2. The decree passed by the Principal Judge, Family Court, Bandra on 13.9.2004 in M.J. Petition No.C-192/1999 and A-1506/2002 is challenged by the petitioner by filing this first appeal. The petition filed by the husband-appellant was for divorce on the ground of cruelty and desertion while the petition filed by the respondent wife was under Section 18 of the Hindu Adoption and Maintenance Act for getting maintenance. In those proceedings by above referred common Judgment decree has been passed wherein divorce by mutual consent has been granted by the Principal Judge, Family Court, Bandra and an amount of Rs.4000/- per month was granted as maintenance to the respondent-wife from the date of the petition i.e. September,1999. It is further directed that till the arrears are wiped off, the said amount shall be paid at double the rate and if the husband fails to pay for three months, the respondent wife shall be entitled to have the amount of arrears and further monthly payments deducted from the salary of the husband. R.T.O. department is also directed to deduct the said amount from the salary of the petitioner-husband. It is further directed that the husband shall hand over the vacant flat above the shop of the respondent wife for her residence and the husband and his agents, servants

and representatives shall not deal with or part with possession of the said flat in favour of any other person. The wife is allowed to put up her lock to secure her possession. The petitioner-husband was further directed to hand over the possession of the vacant MHADA plot to the respondent wife.

3. We have heard both the counsel and surprisingly several aspects revealed in the said proceedings which shows that the Judge has disposed of the matter hurriedly and in an arbitrary manner without following the procedure as laid down under the Act. We find that though the petition filed by the husband was for divorce on the ground of cruelty and desertion, however, no evidence was recorded on the said grounds. There was no petition for mutual consent filed by both of them before the Family court. The original petition filed by the petitioner was not converted by the husband into petition by mutual consent under Section 13-B of the Hindu Marriage Act by carrying out necessary amendment in the said petition. It appears that orally the Judge had recorded the consent of the parties and passed the decree. Such procedure is unwarranted as per the procedure laid down in the Family Courts Act and the rules there under. The Family court had basically failed to take into

consideration that unless there is petition under Section-13(B) of the Hindu Marriage Act, the court has no jurisdiction to grant divorce by mutual consent and therefore, whenever party express their desire to go for divorce by mutual consent, they have to file petition for divorce by mutual consent under Section 13-B of the Act. However, having failed to do that, the decree passed by the Family Court stands vitiated and without jurisdiction. When the parties themselves have invoked the jurisdiction under Section-13 for divorce on the ground of cruelty and desertion, the Judge was under obligation to consider their case on the ground of cruelty and desertion and not on other ground unless M.J. Petition is amended and converted into petition under Section 13(B) of the Hindu Marriage Act.

4. Even though the petition filed by the wife was for maintenance under Section 18 of the Hindu Adoption and Maintenance Act and when the marriage is dissolved under Section 13(B) of the Hindu Marriage Act, then under section 18 of the Hindu Adoption and Maintenance Act there cannot be order for maintenance after dissolution of marriage. The said section applies when the marriage is subsisting between the parties and there are grounds for residing separate as contemplated

under Section 18 of the said Act. However, moment the marriage is dissolved, the said Act ceases to apply for making any provision for maintenance and therefore, if the order is passed by the Judge on a petition of a wife then the said order is bad in law in view of the fact that the dissolution of marriage has taken place in the said decree. At the most the Judge can pass the order of maintenance from the date of filing of the petition till the date of decree of dissolution of the marriage and not beyond that. However, in the present matter regular decree of granting maintenance is passed whereby maintenance from the date of application is granted. Said decree therefore, is not sustainable in law. Apart from that, it may be open for the Judge to say that he has exercised the powers under Section 25 of the Act for permanent alimony. There also, what we find is that the Section 25 contemplates that "Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to Judge for the purpose by either the wife or the husband, the Judge may exercise the jurisdiction". It is an admitted position before this court by both the sides that none of them have invoked the jurisdiction of the court by making written or oral application to pass an order under Section 25 of the Hindu Marriage Act and

therefore, order passed by the Family Court for maintenance cannot be treated under Section-25 of the Hindu Marriage Act and if it is an order passed on the application filed by the wife under Section 18 of the Hindu Adoption and Maintenance Act, then it stands vitiated as stated above as the marriage has been dissolved under Section 13(B) of the Act.

5. It is to be noted that amount of maintenance has been fixed without recording any evidence of either party. Therefore, it is not known from the record-what is the income of wife and husband respectively. There is equally no evidence about their liabilities comparative evaluation of income and liability is not available. Result is the quantum fixed is not supported by evidence and therefore, amount of maintenance of Rs.4000/- p.m. is not sustainable in law.

6. Further more, there is a direction to hand over the vacant possession of the flat by the husband. However, it is revealed from the submissions of both sides counsel that the said flat stands in the name of the brother of the husband. The brother of the husband is not party before the Family court and in his absence it can not be said that the flat in question is the

property of appellant-husband. It is not admitted by the parties before the Family Court that the flat is benami transaction in the name of the brother of the husband and it belongs to the husband. There was no prayer in the petition for divorce and/or petition for maintenance to hand over the possession of the said flat and the flat was never subject matter of the litigation before the Family Court. The property which is not the subject matter of the dispute between the parties is directed to be handed over to the respondent wife. This is done under which law is not known to us. The counsel for the petitioner husband stated that no such term was agreed by the petitioner that the said flat was to be handed over to the wife. The learned counsel for the wife submitted that the wife has showed her willingness to grant divorce by mutual consent provided the flat above her shop is given to her by the husband on permanent basis. However, the counsel for the appellant-husband submitted that no such representation was made in order to obtain the decree of divorce by mutual consent. There are no written minutes on record showing the agreement between husband and wife, then how and in what manner and on what basis the Judge has passed the said order, cannot be understood by this court. But, we find that the Judge if really desire to pass such order, should have

insisted for written terms of the parties so as to pass such an order after allowing amendment in the marriage petition for divorce. We find that whole procedure is arbitrarily followed by the Family court. Even the procedure under Family Courts Act is also not followed by the Judge while passing the said decree. The Judge is an under obligation in adversary litigation to record the oral evidence of the parties to the petition and to give fair chance to other side to rebut the said evidence by adducing oral and documentary evidence. No such procedure is followed. The Section 15 of the said Act reads as under:

> In suit or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judges as the examination of each witness proceeds, **shall,** record or cause to be record, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record."

Both the counsel before this court fairly conceded that at no point of time the evidence was recorded before

the Family court. When the statutory provision contemplates for recording of evidence by the Judge then as to why the Judge has avoided to follow this procedure is not reflected from the record. What we find that the Judge has also ignored Section 10 of the Family Courts Act,1984 which speaks about the procedure generally followed by the Family Court. What prohibited the Judge for not following this procedure is also not on record. However, it appears that the parties to the petition produced certain documents and discussions have taken place. If the documents are produced, unless documents are exhibited either by consent of the parties or proved by the parties they cannot be treated as part of the evidence. Even though the procedure in family court may not be as strict and technical as in civil proceedings. Yet, we find that whatever minimum procedure as contemplated by the Family Courts Act is required to be followed by a Judge, the same has not been followed. Since the parties themselves are allowed to conduct the proceedings, the Judge must not have ignored the procedure while passing the decree in above petitions. There are several disputed facts which the parties are agitating and which cannot be considered in view of lack of record by way of evidence in the matter. Therefore, both the counsel have fairly conceded before

this court that the decree as passed by the Family court is not tenable in law and it may be set aside and the matter may be remanded back to the Family Court.

7. In view of the above circumstances and the concessions given by both the counsel, we allow the appeal and set aside the common Judgment and decree passed by the Family Court in Petition No.A-1506 of 2002 and Petition No.C-192 of 1999 dated 13.9.2004 and remand back the original petition for trial according to law. In the facts and circumstances of the case costs in cause. Since the petitions are pending for pretty long time, we direct the Family Court to dispose of both the petitions within a period of six months from the date of this order after giving full opportunity to both the sides by following procedure as laid down under the Family Courts Act.

8. The petitioner husband has deposited an amount of Rs.50,000/- as per our order dated 4.10.2004 towards the litigation costs. However, since the matter is disposed of in one hearing only, we quantified the litigation costs as Rs.5000/- and we direct the Registrar (Judicial) of this court to pay an amount of Rs.5000/- to the respondent wife as costs of petition and remaining amount of Rs.45,000/- be paid to the

petitioner husband. Since we have remanded the matter, all the contentions and averments are kept open before the Family Court.

(R.S. MOHITE, J.) **(S.B. MHASE, J.)**